

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Skelley Medical, LLC**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275-E:2 I (a), illegal termination for protected reporting

**Employer:** Skelley Medical LLC, 17 Clinton Drive Unit A1, Hollis, NH 03049

**Date of Hearing:** October 17, 2011

**Case No.:** 42477

**BACKGROUND AND STATEMENT OF THE ISSUES**

The hearing for the claimant's Whistleblower's Protection Act complaint was held in conjunction with the claimant's wage claim hearing.

The claimant alleges that he was illegally terminated on August 12, 2011 because he reported to his employer that if his wages were paid later than the designated payday, which is illegal, that he would contact the New Hampshire Department of Labor to inform them his wages due on August 15, 2011 were not paid. He requests, as relief in this action, back commissions, reimbursement of overdraft fees and his monthly salary.

The employer argues the claimant was not terminated as both they and the claimant came to a mutual agreement to terminate their relationship and the claimant received his wages in full on the designated payday. The employer submitted a Separation Agreement and General Release of Claim with the written objection, signed by themselves and the claimant on August 15, 2011.

**FINDINGS OF FACT**

The claimant worked in the employer's shipping and receiving department from January 2010 through August 2011. He was paid a semi-monthly net salary of \$1,121.89 plus commissions on sales.

On Friday, August 12, 2011, the employer verbally notified employees, including the claimant, that the August 15, 2011 payroll might be delayed a few days. The employer sought out the claimant after the meeting to discuss the situation as other staff had indicated the claimant was upset. The claimant was making a personal phone call to a friend for advice and told the employer he would meet him when he was finished. The claimant admitted he sometimes "did not know how to handle life on life's terms", and needed to consult with a friend to ensure he reacted appropriately. The claimant

and the employer met shortly after the claimant finished his personal phone call to discuss the issue of the August 15, 2011 payroll being paid late. The claimant was upset and told the employer, in a threatening manner, he would call the New Hampshire Department of Labor if he did not receive his wages on the designated payday, as required by law. The claimant became increasingly agitated during the meeting and was asked to leave work for the weekend to cool down and return to meet with the employer again on Monday, August 15, 2011. After the claimant left, the employer was approached by several employees and spoke to other employees regarding the claimant's past and present behavior. The employees told the employer that the claimant had become disruptive in the workplace and was difficult to work with. The employer also credibly testified declining performance and attendance issues had been addressed with the claimant on numerous occasions.

The employer made the decision to terminate the claimant because of the past performance and attendance issues and his insubordinate and threatening behavior towards the employer during the August 12, 2011 meeting. The claimant and the employer met on August 15, 2011. The employer paid the claimant all wages, vacation and commissions due. Both parties signed a Separation Agreement and General Release of Claim and the employer terminated the claimant.

### **DISCUSSION AND CONCLUSIONS**

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. he engaged in an act or acts protected by the statute;
2. he suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts he engaged in (his report that paying wages later than designated payday was illegal and he was going to contact the New Hampshire Department of Labor if he were not paid on time) and the action he suffered as a result of that/those protected act/s (termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to his protected act/s.

The claimant establishes a *prima facie* case of illegal termination. He reported to the employer that paying wages later than designated payday was illegal and he if he did not receive his wages on designated payday, he would contact the New Hampshire

Department of Labor. The claimant was terminated by the employer. There is a causal connection between his protected reporting to his termination.

The employer argues the claimant was not terminated because he reported paying wages later than payday was illegal, but for his past performance and attendance issues and his insubordinate and threatening behavior towards the employer during the August 12, 2011 meeting. The employer corrected the reported issue as he paid the claimant his wages due on August 15, 2011, designated payday.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was terminated for his protected acts, for reporting to the employer that if his wages were paid later than designated payday, which is illegal, that he would contact the New Hampshire Department of Labor to inform them his wages due on August 15, 2011, were not paid. The employer paid the claimant his wages due on designated payday, August 15, 2011, correcting the issue the claimant reported. The Hearing Officer finds that the claimant failed to meet that burden of proof as the employer did not terminate the claimant for his protected reporting, rather for his past performance and attendance issues and his insubordinate and threatening behavior towards the employer during the August 12, 2011 meeting. Therefore, the claimant fails to show that that the employer's proffered legitimate, non-retaliatory reason for his termination was not the true reason for the termination, and that his assertions were the true reason for the termination. The claimant fails to establish that the employer's proffered reason for the action is either not credible, or that the termination was more likely motivated by retaliation in response to his protected acts.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that he was terminated in retaliation for his protected reporting.

### **DECISION**

Based on the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was terminated in retaliation for his protected reporting, it is hereby ruled that the Whistleblower's Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: November 9, 2011  
Original: Claimant  
cc: Employer  
MJD/all